United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1063

To be argued by
DON D. BUCHWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1063

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM CORTES-RIOS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DON D. BUCHWALD,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1063

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILLIAM CORTES-RIOS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Cortes-Rios appeals from a judgment of conviction entered on December 22, 1976 in the United States District Court for the Southern District of New York after a plea of guilty before the Honorable Gerard L. Goettel, United States District Judge.

Indictment 76 Cr. 867 was filed and sealed on September 1, 1976 and unsealed the following day upon the arrest in Puerto Rico of appellant Cortes-Rios. The indictment charged Cortes-Rios in Count One with conspiracy to violate the Federal narcotics laws during the period from October 1, 1973 to the date of the filing of the indictment, in violation of Title 21, United States Code, Section 846, and in Counts Two, Three and Four with distributing quantities of heroin ranging from a quarter kilogram (Counts Two and Three) to three kilo-

grams (Count Four) during the summer of 1974 in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On November 5, 1976 Cortes-Rios entered a plea of guilty before Judge Goettel as to Counts One and Two of the Indictment and, in addition, admitted on the record his culpability with respect to Count Four. On November 23, 1976 Cortes-Rios re-entered his pleas of guilty after being further advised by Judge Goettel of the rights he was waiving by entering such guilty pleas.

On December 22, 1976 Judge Goettel sentenced Cortes-Rios concurrently on both counts to twelve years imprisonment, to be followed by a three-year special parole term, and a $20,000 committed fine. At the time of sentencing, the open counts against Cortes-Rios were dismissed with the Government's consent.

Cortes-Rios is presently serving his sentence.

Statement of Facts

William Cortes-Rios was arrested in Puerto Rico on September 2, 1976 upon a bench warrant issued on the preceding day when Indictment 76 Cr. 867 was filed and sealed in the Southern District of New York. The indictment charged Cortes-Rios with participating in a far-flung conspiracy to distribute heroin during a two-and-one-half year period commencing in October 1973 and with three specific distributions of heroin during the summer of 1974.

The Indictment against Cortes-Rios was one of a series of indictments growing out of the activities of a heroin organization in New York run by Fernando Gal-

lardo (the "Gallardo Organization"). Since early 1974, the Gallardo Organization had been the New York outlet for enormous quantities of brown rock Mexican heroin obtained from an organization in Los Angeles controlled by Fernando Valenzuela (the "Valenzuela Organization").* Evidence presented at earlier trials of members of the Gallardo Organization established their responsibility for the distribution of hundreds of kilograms of Mexican heroin in New York during the period of the conspiracy. (Tr. 9/24/76, pp. 3-4).**

Following his arrest, Cortes-Rios was removed to New York and arraigned before Judge Palmieri on September 24, 1976. In conjunction with a bail application made at that time,*** the Government disclosed that it was prepared to prove at trial that within the preceding year, Cortes-

---

* Gallardo, Valenzuela and 22 others (but not Cortes-Rios) were named in Indictment 75 Cr. 1177, filed on December 4, 1975. Gallardo and Valenzuela both jumped bail shortly before their trial in February, 1976. Valenzuela's bail was a one million dollar personal recognizance bond secured by various properties in California and $150,000 in cash. Gallardo jumped a total of $175,000 federal and state cash bail. Subsequently, Gallardo and twenty-three of his associates were named as defendants in another indictment in the Southern District, 77 Cr. 100, filed on February 14, 1977 and unsealed on March 3, 1977. Cortes-Rios was named as an unindicted co-conspirator in that recent indictment.

** Page references with the prefix "Tr." followed by a date refer to the transcript of proceedings on that date designated by the Government for inclusion in the Record on Appeal. Page references with the prefix "App." refer to the Appellant's Appendix. Page references with the prefix "Br." refer to the Appellant's Brief.

*** Upon his arrival in New York Cortes-Rios was represented by Gallardo's attorney Jeffrey Weingard (Tr. 9/24/76, pp. 8-9). In view of the "possibility of conflict," Weingard later withdrew. (Tr. 10/7/76, p. 2). Cortes-Rios' present counsel was retained well before entry of his guilty plea.

Rios had purchased a half million dollars in certificates of deposit at a bank in Puerto Rico. The Government also revealed that its evidence would establish that during 1974 Cortes-Rios made regular trips to California on behalf of the Gallardo Organization to purchase quantities of heroin from the Valenzuela Organization for subsequent distribution in New York. Thereafter Cortes-Rios served as financial overseer of the operation on behalf of Gallardo. (Tr. 9/24/76, pp. 5-6).*

The case was assigned to Judge Goettel who set a mid-November 1976 date for trial. Extensive discovery followed. The Government turned over to the defense various materials including statements of certain co-operating co-conspirators which defense counsel would have received at trial pursuant to the Jencks Act, 18 U.S.C. § 3500. (App. 15, 26).**

Thereafter, on November 3, 1976, Cortes-Rios withdrew his previously entered not guilty pleas, entered guilty pleas to Counts One (conspiracy) and Two (a quarter-kilo heroin distribution in July, 1974) and admitted on the record his culpability with respect to Count Four. (App. 10-26).*** At the time of his plea, Cortes-

---

* Bail in the amount of one million dollars was originally set by Judge Werker upon the filing of the indictment. It was maintained in Puerto Rico during the course of the removal proceedings and was continued by Judge Palmieri. That bail amount was further retained, at the Government's urging, by Judge Goettel to whom the case was assigned, notwithstanding several applications for reduction of bail.

** The families of such co-conspirators had been relocated and placed in the Marshal's Protection Program prior to the filing of the indictment. (Tr. 9/24/76, pp. 5-12).

*** Count Four charged Cortes-Rios with purchasing three kilos of heroin in Los Angeles from co-conspirator Hector Ramos-Irribe of the Valenzuela Organization for $72,000 and returning with the heroin to New York in September 1974. Appellant admitted the foregoing facts but denied recalling the specific *quantity* of heroin involved on this occasion. (App. 25).

Rios admitted making two trips to California for the purpose of purchasing heroin for the Gallardo organization, one with Gallardo himself (who was a fugitive) and one with co-conspirator Raymond Rivera (who, as Cortes-Rios already knew, would be a major witness against him at trial). (App. 24-25, 34-35). At the time of the plea the Assistant United States Attorney stated that the Government would have been prepared at trial to present at least five accomplice witnesses who would testify to Cortes-Rios' key position and involvement within the Gallardo Organization. (App. 25-26). The Government agreed to dismiss the open counts when Cortes-Rios was sentenced and to bring to the attention of the Court any cooperation which Cortes-Rios "offers to the Government, if such cooperation occurs." (App. 11-12).

At the time of the plea, the defendant submitted to the Court a seven page statement describing his involvement in the crime. (App. 12, 18).* With respect to the statement, defense counsel noted: "There may be further information which he can supply to the United States Attorney but I have informed him that is up to him and whether or not the extent of cooperation of course will be considered by the United States Attorney and made known to the Court. But this is at least the first step." (App. 12).

On November 23, 1976, Cortes-Rios re-entered his guilty pleas following further elaboration of the consequences of such pleas by the Court.**

---

* The statement was originally sealed by Judge Goettel at the request of the defense. (App. 18). Although no order for unsealing was ever obtained, the statement appears in appellant's Appendix. (App. 31-37).

** Cortes-Rios was specifically advised on this occasion of his right against self-incrimination and that the possible maximum sentence included, in addition to fifteen years imprisonment on

[Footnote continued on following page]

A pre-sentence report was prepared by the probation department. During the period of preparation of the report, Cortes-Rios refused to discuss the facts of the offense with the probation department and denied the probation department access to the seven-page statement previously furnished to the Court. (App. 39-40).

Prior to the imposition of sentence on December 22, 1976, defendant's counsel acknowledged that he had reviewed the presentence report. (App. 39-40). The defense argued, however, that Cortes-Rios' role within the Gallardo Organization and the actual period during which he participated in the conspiracy were minimal, that his entire involvement was set forth in his previously submitted seven-page statement, and that the Government's description of Cortes-Rios as "the right hand man of the Gallardo organization outside the family" was an exaggeration. (App. 40-42). The defendant himself declined to make a statement to the Court. (App. 42).

In response, the Government pointed out that Cortes-Rios had admitted the substantive violations charged in the indictment, which occurred in the summer of 1974; that he admitted laundering $450,000 through banks in Puerto Rico in March 1976 on behalf of Gallardo; that bank records showed virtually bi-weekly access to safe deposit boxes in Puerto Rico by Cortes-Rios from September 1974 through July 1976; that when arrested in March, 1976 in New York City, co-conspirator Victor Ramirez * had appellant's name and home phone number

---

each of the two counts he was pleading to, *lifetime* special parole (as opposed to only a three year special parole term). Re-entry of the plea was undertaken in view of this Court's then recent pronouncements in *United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976). (Tr. 11/23/76, pp. 2-12).

* On November 30, 1976 Ramirez was convicted on Indictment 76 Cr. 296 before the Honorable Lawrence W. Pierce and a jury.

in Puerto Rico in his possession; and that tapes of telephone conversations between Cortes-Rios and co-conspirator Raymond Rivera in June, 1976 (transcripts of which had been furnished to the defense) established Cortes-Rios' continuing relationship with heroin sources as late as that date. (App. 42-45).

At no time in the proceedings before the District Court, did defendant or his counsel even remotely suggest that he had furnished or offered any cooperation to the Government other than that embodied in the sealed seven-page statement which the District Court had already seen.* With respect to the question of cooperation, Judge Goettel specifically stated that he was not considering Cortes-Rios' failure to furnish additional information to the authorities as a negative factor, but that had such further cooperation been rendered it would have been a factor to consider in the defendant's favor. (App. 40, 46).

After all parties had been heard, Judge Goettel stated that he had carefully reviewed the presentence report **

---

* In fact there had been no further cooperation. (App. 40-41, 45-46). Cortes-Rios had met with Government representatives twice following entry of his plea. On the first occasion, with his attorney present, he acknowledged laundering $450,000 on behalf of Gallardo in March, 1976. (App. 41, 44). This "admission" was probably designed to mitigate the impact of the evidence already in the Government's possession that he had purchased hundreds of thousands of dollars or certificates of deposit in Puerto Rico in his own name. See pp. 3-4, *supra*. During the course of his second meeting with the Government, held with the knowledge and permission of his attorney, Cortes-Rios advised the Government that he had nothing further to say and did not wish to be interviewed again.

** The presentence report made clear that for the outline of the offense the probation department relied on summaries of evidence furnished to it by the Government. The report specified

[Footnote continued on following page]

and that "there was no doubt that the defendant had pled guilty to extremely serious offenses." (App. 46). The District Judge noted that but for the defendant's minimal prior criminal record and the acknowledgment of culpability embodied in the guilty plea itself, the maximum penalty would have been appropriate under the circumstances. (App. 46-47). The Court then imposed concurrent sentences of twelve years imprisonment (with credit for time served), three years special parole and a $20,000 committed fine. (App. 47).

ARGUMENT

The Sentence Imposed on This Major Narcotics Violator Was Based on Constitutionally Permissible Factors, Was Well Within the Statutory Limits and Is Not Reviewable.

In *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974), the Supreme Court reaffirmed the "general proposition that once it is determined that a sentence is within the limitation set forth in the statute under which it is imposed, appellate review is at an end." The law in this Circuit is absolutely clear that absent reliance on materially incorrect information or on constitutionally impermissible factors, sentences imposed within the statu-

---

those facts pertaining to Cortes-Rios which, according to the Government, the defendant had admitted and those facts which the Government claimed were true but the defendant had not admitted. The presentence report has been docketed for inclusion in the Record on Appeal. Cf. *United States* v. *Robin*, 545 F.2d 775, 778 (2d Cir. 1976) (where following the oral argument the Court ordered presentence report made part of the record on appeal).

tory maximum are not reviewable. *United States* v. *Mejias*, Dkt. No. 76-1384, slip op. 2269, 2292 (2d Cir. Mar. 10, 1977); *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976); *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Cf. *United States* v. *Stein*, 544 F.2d 96 (2d Cir. 1976); *United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976).*

The simple and undisputed fact of the matter, as Judge Goettel observed, was that Cortes-Rios was guilty—and had pled guilty—to "extremely serious offenses." (App. 46). By appellant's own admission, he delivered quarter-kilo packages of heroin to Gallardo Organization customers on three separate occasions in May and June of 1974 (App. 12-15, 33); travelled to California in July 1974 with Fernando Gallardo, the head of the heroin organization, carrying a suitcase of money and thereafter returning to New York with a kilo of heroin (App. 15-

---

* While one member of this Court has recently suggested that a sentence within the statutory maximum may be set aside as "cruel and unusual punishment" under certain circumstances, *United States* v. *Stein*, *supra*, 544 F.2d at 104 (Lumbard, *J.* concurring), and there have been occasional suggestions that in exceptional circumstances sentence review may fall within the Court's general supervisory power, *United States* v. *Holder*, 412 F.2d 212, 214-15 (2d Cir. 1969); *United States* v. *McKinney*, 427 F.2d 449 (6th Cir. 1970); *United States* v. *Wiley*, 278 F.2d 500 (7th Cir. 1970), no Court to our knowledge has ever relied upon 28 U.S.C. § 2106, as appellant suggests (Br. 7-8), as an independent basis for sentence review. In *Austin* v. *United States*, 382 F.2d 129 (D.C. Cir. 1967), the District of Columbia Court of Appeals, exercising its authority under 28 U.S.C. § 2106, modified a judgment to reduce a conviction to a lesser included offense. As the concurring opinion in that case makes clear, however, the Court specifically rejected the notion that the section provided general authority to review sentences.

16, 34); made a second trip to California in August 1974 to purchase heroin for the Gallardo organization with Raymond Rivera who Cortes-Rios had himself recruited to "handle the deal" (App. 16, 34-35); obtained an attorney for Gallardo and helped raise bail money for Gallardo following Gallardo's arrest (App. 35-36); and laundered $450,000 for Gallardo in March 1976 through banks in Puerto Rico when Gallardo became a fugitive (App. 41, 44).

Moreover, the District Court's evaluation of the seriousness of his involvement was not limited to appellant's own admissions, which were patently tailored to minimize his own role within a factual setting consistent with that portion of the Jencks Act material of which he had been apprised, and to inculpate only those known to be dead, fugitives, or cooperating. All of the information set forth in the presentence report, which the defendant was given a full opportunity to rebut, could properly have been considered by the District Court. *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 328 U.S. 843 (1965).* The presentence report of the probation department, contained countless references to the specific items of evidence upon which the Government relied in describing Cortes-Rios as the "right-hand man to the king pin of the largest heroin distribution organi-

---

* Sentencing judges are still entitled and encouraged to consider all relevant information about the defendant including crimes on which there has been no conviction, *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); counts of an indictment dismissed by the Government, *United States* v. *Needles*, 472 F.2d 652, 655 (2d Cir. 1973); and hearsay evidence, *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974). See also *United States* v. *Doyle, supra; United States* v. *Seijo, supra.*

zation in New York City that we are aware of in recent years." (App. 45). That evidence included bank records, real estate records, automobile records, court papers, address books, telephone toll call records, tapes, testimony of accomplices and testimony of civilian non-accomplices about enormous cash expenditures such as appellant's purchase of hundreds of thousands of dollars of certificates of deposit. The evidence tied appellant into the highest levels of the organization.

The presentence report was reviewed by the defense which made no attempt even at the time of sentencing to refute the specific items of tangible physical evidence which corroborated appellant's high level complicity in the conspiracy. Indeed, defense counsel, while disputing the conclusion that Cortes-Rios was a high level operative of the Gallardo Organization, conceded the essential accuracy of the underlying facts set forth in the presentence report by offering to keep his own remarks at the time of sentencing "brief" in view of the "full sentence report" before the Court. (App. 39).

Defendant's plea to two counts permitted the District Court to impose a prison term of up to thirty years. The maximum penalties, including the possibility of *consecutive* penalties, were fully explained to Cortes-Rios by his own attorney (App. 31) and by the Court (App. 17). Cortes-Rios acknowledged that he understood the possible penalties and that the purpose of pleading guilty only to Counts One and Two, while having to admit his guilt of Count Four, was to "minimize" his "exposure." (App. 31). The twelve year sentence which he received most certainly fell within the range of his expectations and should have come as no surprise.

Cortes-Rios' contends that the prosecutor failed to inform the sentencing court of the extent of his co-

operation. The only evidence of cooperation which he cites is the seven-page statement submitted to the Court at the time of his plea. To suggest that this cooperation was not brought to the Court's attention is simply absurd. The District Judge had himself read appellant's seven-page sealed statement at the time of its submission. (App. 12, 18-20). At the same time, the Government had made clear its position that the defendant's statement did not candidly acknowledge the extent of his participation in the Gallardo heroin organization. (App. 20). Indeed, the statement had been proffered by defendant's own attorney as simply a "first step." (App. 12).

At the time of sentencing defense counsel was unable to suggest that additional cooperation had been rendered. There had been none. In view of the colloquy at the time of the plea, it should have come as no surprise that, in these circumstances, the Government would state that no cooperation had been offered. Defendant's attempt to make himself his own judge of the value of his cooperation finds no support in law. In agreeing to bring cooperation to the attention of the sentencing judge, the Government does not relinquish its right to assess whether the defendant has in fact offered any cooperation. See *United States* v. *Eucker*, 532 F.2d 249, 256 (2d Cir. 1976). Where, as in this case, no cooperation is rendered, the defendant cannot attempt to take advantage of the bargain which he failed to keep. *United States* v. *Eucker*, *supra*; *United States* v. *Nathan*, 476 F.2d 456, 459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

In any event, at the time of sentence Judge Goettel was fully aware that the defendant's position was that the seven page statement constituted cooperation. In the face of this contention, the District Court determined that

the statement itself did not have "any probation impact." (App. 40). Nevertheless, the judge did not consider any failure to cooperate with the Government as an adverse factor requiring a stiffer sentence. (App. 46).

Appellant's final contention, that he has been prejudiced by the lesser sentences received by cooperating co-conspirators Benito Cruz and Raymond Rivera, is equally frivolous. Judge Goettel was under no obligation to limit appellant's sentence to that imposed on others, particularly where, as here, the role of those others was subordinate to that of appellant and they had provided the Government with meaningful cooperation of such as nature as to require the relocation of their families. See *United States* v. *Araujo*, 539 F.2d 287, 292 (2d Cir. 1976); *Green* v. *United States*, 334 F.2d 733, 736 (1st Cir. 1964), *cert. denied*, 380 U.S. 980 (1965). Sentences should not be meted out on the basis of a comparison study since the punishment is to fit the individual. *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968). In this case, a high level heroin dealer received a period of imprisonment amounting to less than half of the statutory maximum possible under the circumstances. He has nothing to complain of and nothing to appeal from.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DON D. BUCHWALD,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1977— 714—017—575

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DON D. BUCHWALD being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 7th day of APRIL, 1977 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Stanley Shapiro, Esq.
Shapiro, Somer and Wand
P.O. Box 128
1557 Straight Path
Wyandanch, New York 11798

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Don D. Buchwald

DON D. BUCHWALD
Assistant United States Attorney

Sworn to before me this

7th day of April, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979